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No. 92-1414

In the Supreme Court of the United States

OCTOBER TERM, 1992

GARY N. TJOSSEM AND MARILYN E. TJOSSEM,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a notice of deficiency mailed by the Internal Revenue Service to a taxpayer's "last known address" (26 U.S.C. 6212(b)(1)) is valid when the taxpayer claims, but fails to prove, that the notice was not delivered due to Postal Service error.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-13a) is unreported, but the decision is noted at 978 F.2d 712 (Table). The opinion of the Tax Court (Pet. App. 2a-7a) is reported at 62 T.C.M. (CCH) 1555.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1992. A petition for rehearing was denied on December 1, 1992 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on February 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When the Internal Revenue Service determines that a taxpayer owes additional income tax, a "notice of deficiency"—setting forth the amount of, and reasons for the additional tax—must ordinarily be issued by the Service before it may assess and collect the additional amount. A notice of deficiency mailed by certified or registered mail to the taxpayer "at his last known address" is "sufficient" for this purpose. 26 U.S.C. 6212(b)(1).

The taxpayer may petition the Tax Court for review of the asserted deficiency, but must file the petition "[w]ithin 90 days * * * after the notice of deficiency * * * is mailed." 26 U.S.C. 6213(a).[1] During that 90-day period (and, if a timely petition for review is filed, until the conclusion of the Tax Court proceedings), the Service ordinarily is barred from assessing or collecting the additional tax. *Ibid.*[2]

2. On February 2, 1990, the Internal Revenue Service mailed a notice of income tax deficiency to petitioners at their residence at 6131 Coral Ridge, Houston, Texas. Petitioners acknowledge that the

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[1] Alternatively, a taxpayer may pay the additional tax asserted and sue for a refund in the district court or the United States Court of Federal Claims. See 26 U.S.C. 6532, 7422, 28 U.S.C. 1346(a)(1).

[2] During the period that assessment is barred by the Tax Court proceedings, the normal three-year statute of limitations on assessments is tolled. 26 U.S.C. 6503(a)(1). There are exceptional situations involving "termination assessments" and "jeopardy assessments" where the Service is not barred from assessing and collecting taxes pending Tax Court review. See 26 U.S.C. 6213(a), 6851, 6852, 6861. Those exceptions are not involved in this case.

notice was sent to their correct address (Pet. App. 11a). The Postal Service form evidencing delivery of the notice, however, was signed by Mr. R. O. Brenner, who lived across the street from petitioners at 6134 Coral Ridge, Houston, Texas (*ibid.*). Mr. Brenner is now deceased (*id.* at 3a, 11a n.2). Petitioner Gary Tjossem testified that he did not receive the notice of deficiency that his neighbor had signed for and received (*id.* at 11a).

The 90-day period for the timely filing of a petition for Tax Court review of petitioners' deficiency expired on May 3, 1990. No petition had been filed by that date. On August 13, 1990, the Commissioner therefore assessed the taxes and additions to tax reflected in the notice of deficiency. See 26 U.S.C. 6213(a), (c).

3. Several months later, petitioners filed an untimely petition in the Tax Court for review of their tax deficiency (Pet. App. 4a). The Commissioner moved to dismiss the petition as untimely under 26 U.S.C. 6213(a). Petitioners contended, however, that the notice of deficiency was invalid because it had not been addressed and mailed to them in accordance with the requirements of 26 U.S.C. 6212. Petitioners claimed that, even if the notice had been properly mailed by the Commissioner, it was invalid because it was delivered to their neighbor instead of to their own residence (Pet. App. 11a-12a).

The Tax Court conducted an evidentiary hearing at which the parties stipulated that the Service properly mailed the notice of deficiency to petitioners' last known address (Pet. App. 7a). The Commissioner also introduced the Postal Service form that showed that the notice of deficiency had been delivered to petition-

ers' neighbor, Mr. R. O. Brenner (*id.* at 11a-13a). Petitioners' only evidence was the testimony of Gary Tjossem, who testified that Mr. Brenner did not deliver the notice of deficiency to him (*id.* at 13a n.6).

The Tax Court held that it lacked jurisdiction because the petition had not been filed within 90 days of the date the notice of deficiency was "mailed," as 26 U.S.C. 6213(a) requires (Pet. App. 4a-7a, 11a). The court concluded that petitioners did not satisfy their burden of proving that they did not actually receive the notice (*id.* at 5a). The court further held that, even if petitioners had *not* received the notice, their Tax Court petition was untimely because the notice of deficiency was properly "mailed" to petitioners at their last known address and was therefore valid (Pet. App. 6a-7a, 12a-13a).

4. The court of appeals affirmed (Pet. App. 10a-13a). The court noted that the Tax Court had ruled against petitioners on two separate grounds: (i) that petitioners had failed to prove that they did not actually receive the notice of deficiency, and (ii) that "even if the taxpayers had proven the facts they alleged," the notice mailed to the correct address was sufficient as a matter of law (*id.* at 13a).[3] The court found no basis to disturb the Tax Court's factual determinations and also agreed with the Tax Court that, because the Commissioner had mailed the notice to the taxpayer's "last known address" (26 U.S.C. 6212(b)(1)), the

[3] The court of appeals declined to consider petitioners' argument that their neighbor had stolen the notice of deficiency because that argument was not raised in the Tax Court (Pet. App. 12a n.3).

"taxpayer's failure to receive the Notice was * * * irrelevant" (Pet. App. 13a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The decision, moreover, ultimately rests on a finding of fact concurred in by both courts below. Further review is therefore not warranted.

1. Section 6212 of the Internal Revenue Code authorizes the Internal Revenue Service to send a notice of deficiency to a taxpayer "by certified mail or registered mail." 26 U.S.C. 6212(a). Once the notice "is mailed," the taxpayer has 90 days to seek review of the asserted deficiency in the Tax Court. 26 U.S.C. 6213(a). To provide uniform and predictable procedures, Congress has specified that the notice, "if mailed to the taxpayer at his last known address, shall be sufficient" (26 U.S.C. 6212(b)(1)). So long as the notice is mailed to the taxpayer's "last known address," it is "sufficient" to permit subsequent assessment of the asserted deficiency, even if the notice is not actually received by the taxpayer. See, *e.g.*, *Keado* v. *United States*, 853 F.2d 1209, 1211-1212 & n.9 (5th Cir. 1988); *Williams* v. *Commissioner*, 935 F.2d 1066, 1067 (9th Cir. 1991); *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988); *Scheidt* v. *Commissioner*, 967 F.2d 1448, 1451 (10th Cir.), cert. denied, 113 S. Ct. 811 (1992); *Hoffenberg* v. *Commissioner*, 905 F.2d 665, 666 (2d Cir. 1990); *Brown* v. *Lethert*, 360 F.2d 560, 562 (8th Cir. 1966). But see

Powell v. *Commissioner*, 958 F.2d 53 (4th Cir.), cert. denied, 113 S. Ct. 440 (1992).[4]

2. Petitioners stipulated (Pet. App. 3a) that the Service properly mailed the notice of deficiency to their "last known address." They also stipulated (*ibid.*) that the notice was delivered by the Postal Service to their neighbor across the street. Petitioners argued in the Tax Court that the Postal Service was not authorized to deliver the notice of deficiency to their neighbor, that their neighbor failed to deliver the notice to them and that the court therefore should declare the deficiency notice invalid.

The Tax Court concluded, however, that petitioners had failed to meet their burden of establishing that they had not actually received the deficiency notice. The Tax Court did not accept the testimony of Mr. Tjossem that his neighbor did not bring him the notice of deficiency (Pet. App. 5a, 13a). The credibility of Mr. Tjossem's testimony was a matter for the Tax Court to determine. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). Among the factors casting doubt on the reliability of that testimony, the court noted that Mr. Tjossem's wife, Marilyn Tjossem, had not taken the stand and that Mr. Tjossem's testimony was thus entirely uncorroborated (Pet. App. 5a). The court of appeals

[4] In *Powell* v. *Commissioner*, 958 F.2d at 56, the Fourth Circuit concluded that a deficiency notice is *not* "sufficient" under 26 U.S.C. 6212(b) if it is not received by the taxpayer due to an error of the Postal Service. That holding in *Powell* directly conflicts with the decisions cited in the text. The conflict created by *Powell* is not, however, directly presented in this case because petitioners did not establish that "they did not actually receive the Notice" (Pet. App. 13a).

accepted the Tax Court's evaluation of the evidence. This factual determination, concurred in by both courts below, does not warrant further review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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